IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUSTINE OGDEN and TRAVIS GORDON,[1]	§	
	§	No. 540, 2009
	§	
Petitioners Below-Appellants,	§	
	§	
	§	
v.	§	Court Below—Family Court
	§	of the State of Delaware,
BRIAN COLLINS, JANE HUDSON,	§	in and for Kent County
and THE DIVISION OF FAMILY	§	File No. CK08-02645
SERVICES,	§	Petition Nos. 08-29581 and
	§	09-14006
Respondents Below-Appellees.	§	
	§	

Submitted: September 10, 2010
Decided: November 29, 2010

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 29th day of November 2010, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) This is an appeal from a Family Court order dismissing the appellants' petition for guardianship and denying their petition for permanent guardianship. Justine Ogden, appellant, is the cousin of the mother of appellee, Brian Collins. Ogden and her husband, appellant Travis Gordon, filed two separate petitions seeking guardianship and permanent guardianship of Collins' minor daughter,

[1] Pseudonyms have been assigned to the parties, the minor child, and the foster family pursuant to Supreme Court Rule 7(d).

Karen. The Family Court dismissed the guardianship petition after appellants' then-counsel advised the trial court that they no longer intended to pursue that petition.[2] The Family Court denied Ogden's permanent guardianship petition[3] based on its determination that permanent guardianship was not in Karen's best interests. We find the Family Court's rulings to be supported by the record and, for the reasons set forth herein, affirm the judgment below.

(2) The record reflects the following relevant facts: Karen was born to appellees, Brian Collins (Father) and Jane Hudson (Mother), on September 7, 2006. Mother also had an older son, born August 2, 2002, who was not the biological child of Father.[4] Both children had birth defects. In December 2006, a hot line report to the Division of Family Services (DFS) indicated that Karen, who was then three months old, may be malnourished. DFS investigated and determined the report was unfounded. Shortly thereafter, Karen had corrective surgery to fix the birth defect to her throat and was hospitalized from December 2006 until April 2007. A tracheotomy tube was inserted, which allowed Karen to gain weight. In April 2007, Karen was transferred to a long-term care facility,

[2] Appellants, who are now *pro se* on appeal, appear to deny that they agreed to dismiss their guardianship petition.

[3] Once the Family Court dismissed the guardianship petition, the parties represented to the Family Court that they agreed Travis Gordon should be excluded as a petitioner on the permanent guardianship petition because he is not a blood relative of Karen and, thus, lacked standing to seek permanent guardianship. *See* 13 Del. C. § 2351 (2009) (providing that only a blood relative, parent, or foster parent may petition for permanent guardianship of a minor child).

[4] The parents had been working with DFS for a number of years with respect to Karen's older half-brother, who already was in DFS custody at the time Karen entered DFS custody.

Exceptional Care for Children (ECC), because of her ongoing medical needs and because of her parents' lack of medical training and lack of adequate housing. DFS entered a case plan with the parents at that time, which required them to obtain employment, find suitable housing, get necessary medical training, work with a parent aide, and continue with mental health treatment.

(3) On August 21, 2008, when Karen was due to be discharged from EEC after a sixteen-month stay, DFS filed an emergency dependency and neglect petition seeking custody of Karen on the ground that Mother and Father had failed to complete their case plan. DFS was granted custody of Karen and thereafter placed her in foster care. The foster mother was a nurse at EEC who was familiar with Karen and her medical needs. On August 26, 2008, counsel was appointed to represent Mother and Father, and the Family Court held a preliminary protective hearing. During the course of that proceeding, Mother and Father agreed to have Karen remain in DFS custody, and waived their rights to both the preliminary protective hearing and an adjudicatory hearing for Karen. On the same day, August 26, 2008, Ogden and Gordon filed their petition to be appointed guardians of Karen.

(4) At the dispositional hearing held in the dependency case on September 16, 2008, Mother and Father entered into a written DFS case plan, which set forth the requirements that they needed to meet to be reunified with

Karen. Several review hearings were held thereafter in order to review the progress Mother and Father were making with their case plan and to determine whether Karen could be returned to their care.

(5) On November 3, 2008, the Family Court held a separate hearing on the petition for guardianship. DFS opposed granting guardianship to Ogden and Gordon because of Karen's medical needs. DFS also requested that a home study be performed to ensure that Ogden and Gordon were capable of meeting Karen's special needs in their home. The Family Court continued the guardianship proceeding until January 2009 in order to have Ogden and Gordon arrange for a home study and for them to receive training on Karen's medical care. The Family Court also ordered that Ogden and Gordon could have weekly visitation with Karen of two hours per week. The trial judge expressed concern that the petition for guardianship did not offer a permanent solution for Karen's placement, and encouraged the petitioners to consider filing a petition for permanent guardianship.

(6) The Family Court held the rescheduled hearing on the guardianship petition on January 26, 2009. Ogden and Gordon's counsel informed the trial court that he believed the hearing was only a status hearing since the home study, which had begun in November, was not yet completed. At that hearing, DFS called the director of social services of EEC to testify about her observations and interactions with Ogden while Karen was at the facility. Among other things, the director

testified that Ogden had only begun to visit Karen in July 2008, shortly before her release, and that those visits, which occurred in the evenings, were disruptive to Karen's bedtime routine. The director also testified about a document Ogden had presented to EEC, before filing the petition for guardianship, which purported to be a "Voluntary Consent to Guardianship," signed by Ogden, Mother, Father, and Father's mother. That document provided that Karen would be passed between Ogden and Father's mother until they decided to return Karen to her parents. EEC informed Ogden that it would not honor the "voluntary guardianship" because it was not a signed court order.

(7) At the January 2009 hearing, DFS also called Karen's foster mother, Kelly Smith, who testified about Karen's steady progress while in foster care and about Karen's apparent anxiety and night terrors following visits with her biological family. Ogden testified on her own behalf stating, among other things, that Karen had developed a strong bond with her and her husband and that she showed no signs of anxiety during their visits. At the conclusion of the hearing, the Family Court continued the guardianship matter until April to allow the completion of the home study. The Court also ordered, at the request of DFS, that the guardianship case involving Karen be consolidated with DFS' dependency case involving Karen.

(8) On April 20, 2009, the Family Court held a consolidated hearing on the status of the guardianship and dependency cases. At that time, Mother and Father's lawyer informed the Court that his clients intended voluntarily to terminate their parental rights with respect to Karen. DFS also reported to the trial judge that the home study report had not yet been received, and thus the Child Placement Review Board had not yet held a hearing on Karen's placement. Accordingly, the trial court rescheduled the hearing until July. During the intervening months, the trial court ordered that a certified therapist work with Karen to determine if she was experiencing anxiety and also to sit as an observer during at least one of Karen's two-hour visits with Ogden and Gordon. On April 27, 2009, Ogden and Gordon filed their petition for permanent guardianship.

(9) On July 8 and 17, 2009, the Family Court held a second, two-day consolidated hearing, which also served as Karen's permanency hearing. At that hearing, Odgen and Gordon, and several of Ogden's relatives testified. Ogden and Gordon both testified to the strong bond they had developed with Karen and the efforts they would make to assimilate Karen into their home, care for her, and tend to her medical needs. Also admitted into evidence was the Child Placement Review Board's decision, that Karen's reunification with her parents was not appropriate given their failure to comply with their case plan objectives. The Board found that placement of Karen in the Smith's foster home was appropriate,

but concluded that, for adoption purposes, equal weight should be given to Ogden and Gordon's guardianship petition.

(10) DFS presented the testimony of several witnesses, including Karen's court-appointed therapist. The therapist testified that she had had five sessions with Karen since April, and had also sat as an observer during a two-hour visit between Karen and Ogden and Gordon. The therapist testified that during her two-hour observation period, Karen did not appear to be bonded with Ogden. After her foster father dropped her off for the visit and left the room, Karen continued to ask, "Where did my daddy go?" The therapist opined that the visit seemed to cause Karen stress. Karen's daycare teacher also testified that on days after visits with Ogden and Gordon, Karen exhibited behavior changes, such as clinging to her foster parents and being antisocial with the other children. The parent aide appointed to supervise Mother and Father's visits with Karen also testified that Karen was very bonded to her foster family, called them "mommy" and "daddy," and would continue to ask for her foster parents after she was dropped off for visitation with Mother and Father. The aide testified that in the one visit she observed between Karen and Ogden and Gordon, Karen did not seem as comfortable with Ogden and Gordon. Karen's Court Appointed Special Advocate (CASA) also testified that, given Karen's close bond with her foster family, she did

not believe it was in Karen's best interests to grant Ogden and Gordon's petition for guardianship or permanent guardianship.

(11) Both Mother and Father testified at the hearing that they wished for Karen to be adopted by her foster family because she had bonded so closely with them. Both parents believed it would be disruptive to place Karen with Ogden and Gordon, and both denied Ogden's suggestion that they were not competent to make this judgment. Mother and Father also testified that they intended voluntarily to terminate their parental rights to Karen, and each denied that anyone had made promises to them in exchange for their decision to voluntarily terminate their parental rights. Given the parents' position and the fact that they had failed to complete their case plan, DFS requested to change the permanency goal for Karen from reunification to termination of parental rights and adoption. At the conclusion of the hearing, the Family Court reserved decision in the case.

(12) The Family Court issued its decision, which dismissed Ogden and Gordon's petition for guardianship and denied Ogden's petition for permanent guardianship, on August 14, 2009. The Family Court considered all of the factors governing permanent guardianships, as set forth in 13 Del. C. § 2353(a), and found, among other reasons, that granting Ogden's petition for permanent guardianship was not in Karen's best interests. This appeal followed.

(13) On June 11, 2010, appellants filed a document purporting to be their opening brief on appeal. The document contained a 42-page opening brief, a 25-page "supplemental opening brief," and a 22-page "second supplemental opening brief." Although the Court initially struck the appellants' brief for failure to comply with the 35-page limit for opening briefs, the appellants were later granted a page extension and were permitted to file their 89-page "opening brief.[5]" Appellants enumerate seven issues in their opening brief and "supplements." First, they argue that the State illegally seized Karen and violated her constitutional rights. Second, they contend that the trial court erred in failing to obtain a meaningful social report. Third, they assert that the trial court abused its discretion in denying their petition for permanent guardianship. The appellants' fourth, fifth, and sixth arguments, which appear in their "first supplemental brief," are difficult to discern. Appellants appear to argue that, given the consolidation of the dependency/neglect case with the guardianship case, they were entitled to all records related to the dependency/neglect case, including the separate dependency/neglect case involving Karen's half-brother, and that their due process rights were denied when they were excluded from proceedings and denied access

[5] *See Gunzl v. R&K Motors & Mach. Shop*, 2004 WL 1058367 (Del. May 4, 2004) (noting that self-represented litigants are afforded a degree of leniency in filing documents on appeal that would not otherwise be afforded to lawyers).

to certain records. Finally, appellants contend that the Family Court erred in denying them visitation with Karen after the guardianship petition was denied.

(14) Before addressing the merits of any of these arguments, we first note what is properly before the Court for consideration. Because the appellants are *pro se*, and because the Court wanted to move this appeal forward as expeditiously as possible, the Court afforded the appellants substantial leeway in filing their documents on appeal, but without prejudice to the appellees' later right to object. At the outset, we note that the appellants' appendices contain numerous documents that were never presented to the trial court in the first instance for its consideration. Those documents are clearly inappropriate for consideration, because they are not a part of the record on appeal.[6] The Court has limited its consideration in this matter to the Family Court record, excluding those transcripts of Karen's half-brother's dependency proceedings, which were prepared by the court reporter and inadvertently included in the record transmitted by the Family Court.

(15) We further note that many of the arguments appellants raise on appeal relate to the dependency/neglect proceedings. The appellants were not parties to the dependency/neglect proceedings, however, and thus have no standing to

[6] *See Delaware Elec. Coop. v. Duphily*, 703 A.2d 1202, 1207 (Del. 1997) (holding that only those materials that were admitted into evidence at trial or were entered into the trial court record through motion are considered part of the "record on appeal" under Supreme Court Rule 9).

challenge those proceedings on appeal.[7] The Family Court's consolidation of the dependency/neglect proceedings with the guardianship proceedings was an effort to streamline two cases involving common legal and factual issues to avoid duplication of effort and prevent any conflicting outcomes.[8] The consolidation did not, as appellants seem to argue, make them "parties" to the dependency/neglect proceedings. As the Third Circuit Court of Appeals has noted, "[c]onsolidation does not merge [two] suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."[9] Although Father has filed a brief in support of Ogden in this appeal, Father did not file his own appeal.[10] Any issue with respect to the dependency/neglect proceeding involving Karen is not properly before this Court for consideration. Nor do the appellants, who are not Karen's parents, or her guardians or legal counsel, have standing to raise any arguments asserting a violation of Karen's constitutional rights in the dependency/neglect proceedings.[11]

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[7] *See Hughes v. DFS*, 836 A.2d 498, 506 (Del. 2003) (holding that mother, in an appeal from the Family Court's termination of her parental rights, had no standing to challenge the Family Court's denial of maternal aunt's petition for guardianship as the aunt was not a party to the proceedings and had not filed an appeal in her own right).

[8] *See* Del. Fam. Ct. R. Civ. R. 42(a) (2010).

[9] *In re TMI Litigation*, 193 F.3d 613, 724 (3d Cir. 1999) (quoting *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 497 (1933)).

[10] Father's position in support of Ogden's appeal obviously contradicts the position he took in Family Court.

[11] *Townsend v. Griffith*, 570 A.2d 1157, 1158 (Del. 1990).

(16) Lastly, we note that the appellants filed their notice of appeal in this matter on September 14, 2009. Their notice specified that the appeal was being taken from the Family Court's August 14, 2009 decision denying their guardianship and permanent guardianship petitions. That notice did not identify or include the Family Court's August 21, 2009 decision rescinding their visitation rights as a subject of their appeal. Accordingly, that order is not properly before the Court for consideration.[12]

(17) The scope of this Court's review of a Family Court order denying a petition for guardianship includes a review of both law and facts.[13] Where the Family Court correctly applied the law, we review under an abuse of discretion standard.[14] The Family Court's factual findings will not be disturbed on appeal if those findings are supported by the record.[15] Where the determination of facts turns on the credibility of the witnesses who testified under oath before the trial judge, this Court will not substitute its opinion for that of the trial judge.[16]

(18) We first address the appellants' challenge to the Family Court's dismissal of their regular guardianship petition. The Family Court dismissed the petition based on counsel's representation that the appellants were withdrawing

[12] *Trowell v. Diamond Supply Co.*, 91 A.2d 797, 801 (1952) (holding that, when a notice of appeal is clear and unambiguous as to the order being appealed, it is binding on the appellant and is ineffectual to bring up any other judgment for review other than the one specified).
[13] *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).
[14] *Jones v. Lang*, 591 A.2d 185, 186-87 (Del. 1991).
[15] *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983).
[16] *Wife (J.F.V) v. Husband (O.W.V., Jr.)*, 402 A.2d at 1204.

their regular guardianship petition in favor of their later-filed permanent guardianship petition. In their opening brief on appeal, the appellants deny that they ever agreed to withdraw their regular guardianship petition. Despite the appellants' present contention, however, their attorney is deemed to have had the general authority to act on their behalf,[17] and the appellants cannot avoid the consequences of their attorney's representation to the court. Under our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent.[18] Accordingly, we find no error in the Family Court's dismissal of the appellants' regular guardianship petition.

(19) Next, we address Ogden's contention that she was denied the right to have a meaningful social report[19] submitted in support of her permanent guardianship petition. The record discloses however, that Ogden did submit a social report into evidence at the hearing and that the social report was very favorable to Ogden. To the extent that Ogden now claims that this report was somehow deficient, she has waived that claimed for failing to raise it before the Family Court in the first instance.[20] Further, to the extent that Ogden claims that the Family Court erred in failing to permit the author of the social report to testify

[17] *Trans World Airlines, Inc. v. Summa Corp.*, 394 A.2d 241, 244 (Del. Ch. 1978).
[18] *Gebhart v. Ernest DiSabatino & Sons, Inc.*, 264 A.2d 157, 160 (Del. 1970).
[19] *See* 18 Del. C. § 2354 (requiring that a permanent guardianship petitioner obtain a social report from a licensed child-placing agency analyzing the factors for permanent guardianship under Section 2353).
[20] Del. Supr. Ct. R. 8 (2010).

at the hearing, she waived that claim as well. The record reflects that a week before the hearing, Ogden's counsel filed a motion seeking permission for the author of the social report to testify via telephone. The Family Court, however, had not acted on the motion before the hearing began, and counsel failed to renew his request or otherwise seek a ruling on his motion. The hearing went forward and counsel never attempted to call the author of the report as a witness. Failure to pursue the motion at trial constitutes an abandonment of the issue and operates as a waiver of the claim on appeal.[21]

(20) Finally, we turn to Ogden's claim that the Family Court erred in denying her petition for permanent guardianship. The standards for a permanent guardianship are set forth in 13 Del. C. § 2353(a), which provides, in relevant part, that the Family Court shall grant a petition for permanent guardianship if it finds by clear and convincing evidence that:

> (1) One of the statutory grounds for termination of parental rights as set forth in 1103(a) of this title has been met;
> (2) Adoption of the child is not possible or appropriate;
> (3) Permanent guardianship is in the best interest of the child;[22]

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[21] *See United States v. Johnson*, 223 F.3d 665, 668 (7th Cir. 2000).

[22] To determine the best interests of the child, 13 Del. C. § 722(a) provides a list of eight factors for the Family Court to consider:

1) The wishes of the child's parent or parents as to his or her custody and residential arrangements;
2) The wishes of the child as to his or her custodian(s) and residential arrangements;
3) The interaction and interrelationship of the child with his or her parents, grandparents, siblings, person cohabitating in the relationship of husband and wife with a parent of the child, any other residents of the household or persons who may significantly affect the child's best interests;

(4) The proposed permanent guardian:

a. Is emotionally, mentally, physically and financially suitable to become the permanent guardian;

b. Is a foster parent(s) who has been caring for the child for at least 6 months at the time of the filing of the petition or is a blood relative;

c. Has expressly committed to remain the permanent guardian and assume the rights and responsibilities for the child for the duration of the child's minority; and

d. Has demonstrated an understanding of the financial implications of becoming a permanent guardian;

(21) In its decision, the Family Court reviewed all of the testimony and evidence presented. The court found by clear and convincing evidence that one of the statutory grounds for termination of parental rights had been established, namely that Mother and Father had failed to plan for Karen.[23] The court also found that Ogden, as the proposed permanent guardian was emotionally, mentally, physically and financially suitable to become the permanent guardian, was a blood relative of Karen, had expressly committed to remain the permanent guardian and assume the rights and responsibilities for Karen for the duration of her minority, and had demonstrated an understanding of the financial implications of becoming a permanent guardian.

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4) The child's adjustment to his or her home, school and community;
5) The mental and physical health of all individuals involved;
6) Past and present compliance by both parents with their rights and responsibilities of their child under § 701 of this title;
7) Evidence of domestic violence as provided for in Chapter 7A of this title; and
8) The criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.

[23] 13 Del. C. § 1103(a)(5) (2009).

(22) The Family Court found, however, that Ogden had failed to establish why an adoption of Karen was neither possible nor appropriate under Section 2353(a)(2). Kelly Smith, the foster mother, testified that her family was willing to serve as an adoptive resource for Karen. The Family Court noted that Ogden had attempted to argue that there was a conflict of interest between Kelly Smith's professional obligations as one of Karen's former nurses and her wish to adopt Karen. The Family Court concluded, however, that the evidence presented was insufficient to establish that adoption of Karen by the Smith family was not possible or appropriate.

(23) Finally, the Family Court reviewed the best interest factors. The court noted that both Mother and Father testified that it was their wish that Karen be adopted by her foster family. Accordingly, neither Mother nor Father's testimony supported Ogden's petition for permanent guardianship. As for Karen's interactions with Ogden and her family, the Family Court noted evidence that Karen was affectionate with both Ogden and Gordon during their visits and that their family and extended family were very supportive of Ogden's guardianship petition and would help Karen's transition if the guardianship were granted. But, the Family Court also noted that Karen had been living with her foster family for months, had become closely bonded with the Smith family and referred to Mr. and Mrs. Smith as mommy and daddy. Karen had adjusted to living with the Smiths

and had exhibited signs of stress after visits with her biological family. The Family Court specifically noted the testimony of Karen's therapist, who testified that Karen was very bonded to her foster family and that it would be emotionally traumatic to remove Karen from their home and place her with Ogden. Based on all of the evidence, the Family Court concluded that Ogden had failed to establish by clear and convincing evidence that granting the permanent guardianship was in Karen's best interests.

(24) We have reviewed the record carefully in this case. The Family Court's factual findings are amply supported by the record and are not clearly wrong. Moreover, the Family Court correctly applied the law. Under the circumstances, we find no abuse of discretion in the Family Court's denial of Ogden's petition for permanent guardianship.

NOW, THEREFORE, IT IS ORDERED that judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice